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SERVED DECEMBER 8, 2006

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

IN THE MATTER OF

JOAQUIN RODRIGUEZ

FAA DOCKET NO. CP05SO0049
(Civil Penalty Action)

DMS NO. FAA-2005-22885-14

INITITAL DECISION OF ADMINISTRATIVE LAW JUDGE ISAAC D. BENKIN

Joaquin Rodriguez, the Respondent in this case, is charged with assaulting a member of the crew of a Southwest Airlines aircraft in flight from Islip, New York to Orlando, Florida. The incident took place on March 4, 2005.

The complaint of the Federal Aviation Administration (FAA) was filed and served on October 27, 2005. The case was assigned for hearing to Chief Judge Yoder. The Respondent did not file a timely answer to the complaint, and the FAA on February 8, 2006 filed a motion to deem the allegations of the complaint admitted. The Chief Judge issued an order, requiring the Respondent to show cause why he should not be defaulted for failure to file an answer or a motion directed to the complaint. The Respondent's return to the show-cause order argued that the complaint had been sent to the wrong address and, so, did not come to his attention. Judge Yoder decided to give the Respondent a second chance, the first of many second chances the Respondent has received throughout this proceeding. On May 16, 2006, he issued an order denying the pending motion of the FAA and directing the Respondent, on or before June 15, 2006, to file an answer or motion directed to the complaint and to provide the judge himself and the FAA with a valid address.

The Respondent did neither.

On May 16, 2006, Chief Judge Yoder reassigned this case to me.

On August 15, 2006, the FAA renewed its motion to dismiss. I granted the agency's motion the following day in an order which ruled that the Respondent was liable for a civil penalty under both 14 C.F.R. § 121.580 and 49 U.S.C. § 46318 on account of his conduct on the Southwest Airlines flight on March 4, 2005. Both of those provisions prohibit assaults on the crewmembers of commercial aircraft. The violations consisted of the Respondent's altercation with a flight attendant, during which he wadded up an emesis bag and threw it at her and told her that "when we get on the ground I am going to kick your f----ing ass." Under my order of August 16, 2006, the hearing was to be limited to the issue of the amount of the penalty to be assessed against the Respondent.

Pursuant to notice to all parties, a hearing was convened in Islip, New York on October 24, 2006. The Respondent did not appear in person at the hearing. He was, however, represented by counsel. The FAA presented the testimony of Stanley Okon, a Flight Standards Inspector of the FAA. Inspector Okon sponsored three flight irregularity reports made by members of the flight crew of the aircraft in which the incident occurred as well as a letter that he had sent to the Respondent. All of these documents were received in evidence. Inspector Okon testified that in his judgment and experience, the amount of the civil penalty sought by the FAA, $7,300, was thoroughly justified. He was, however, unable to provide details about how the proposed penalty of $7,300 was calculated. Inspector Okon testified that his recommendation was compounded of three elements: disruption of other passengers, throwing of an object at the flight attendant, and "physically touching [of the flight attendant] that borders on assault." Tr. 32.

At the conclusion of the hearing, counsel for the Respondent asked for a continuance to present evidence relating to the appropriate size of the penalty and, specifically, to the Respondent's ability to pay. Once again, the Respondent was given the benefit of a second chance. Instead of ruling that the Respondent's opportunity to present his side of the case had come and gone when he chose not to appear at the hearing, I granted the request for a continuance.

My ruling was put into written form in an order issued October 27, 2006. In that order, I provided for a continuance of the hearing to December 14, 2006, and directed the Respondent to file his list of witnesses whom he expected to testify on his behalf together with a copy of each document he proposed to offer in evidence. Once again, the Respondent did not do as the administrative law judge directed. Instead, on November 13, 2006, the Respondent filed two sets of documents. The first was a declaration (i.e. affidavit) by his attorney in which he stated "my client does not intend to present witnesses to testify in this proceeding." The second was an affidavit (titled "affirmation") by the Respondent himself. In that affidavit, the Respondent acknowledged that he had had a "disagreement" with a flight attendant. He described the encounter as "regrettable" and indicated that he had been depressed by his recent break-up with a female friend and had been returning to his family in Florida for their "emotional and financial support." The Respondent went on to say that he was currently "unemployed and without any meaningful work," had no assets and was living in a home that was the subject of a foreclosure action. Attached to Respondent's affidavit were what purported to be copies of his state and federal income tax returns, various documents pertaining to his military service and copies of earnings statements provided by the Social Security Administration.

Upon receipt of this material, I asked the FAA to indicate whether it would object to the receipt of it in evidence without the opportunity to cross-examine the Respondent. The FAA's response was to indicate that it objected to receiving Respondent's counsel's declaration and the tax return forms, but not the other documents that Respondent had submitted. As the FAA's counsel correctly pointed out, there were serious questions about the authenticity of the tax returns the Respondent had submitted, inasmuch as none of the forms had been signed, either by the Respondent or by the preparer.

In light of the Respondent's refusal to participate in the continued hearing he had so earnestly sought, I issued an order on December 4, 2006, closing the record, sustaining the FAA's objections to the proffer of the tax return forms and the attorney's declaration, and receiving the remaining documents as late-filed exhibits. The continued hearing was cancelled.

* * * * *

The complaint in this case did not charge the Respondent with being generally disruptive to other passengers. It charged that the Respondent (a) "threw an item at a flight attendant;" and (b) "threatened to do bodily harm to a flight attendant." Nor did the complaint charge that the Respondent physically touched another occupant of the aircraft. In short, two of the three events on which Inspector Okon relied to justify the FAA's penalty recommendation simply did not take place or were not charged. It is true that the complaint also said that the Respondent's "behavior" caused him to be reseated by the flight attendants. That statement might conceivably justify a substantial enhancement of the civil penalty – except that there is nothing in the Federal Aviation Regulations or the statute that prohibits general bad behavior, except when it constitutes an "action that constitutes an immediate threat to the safety of the aircraft or other individuals on the aircraft." There is no allegation in the complaint that the Respondent's behavior (which is not described) caused an "immediate threat" to safety. Since the language of the complaint is the touchstone of liability where, as here, the Respondent has defaulted for failure to file a proper answer, it seems to follow that the amount of the penalty must be limited by the specific violations with which he was charged. They are his act of throwing a wadded up bag at a flight attendant and threatening the flight attendant with imminent physical harm.

Both of those acts constituted a common-law assault. "An act of such a nature as to excite an apprehension of a battery may constitute an assault." Prosser, Handbook of the Law of Torts (3d ed. 1964) 38; Restatement of Torts 2d § 21. The Administrator has held that the term "assault" as used in the Federal Aviation Regulations include the intentional torts of both assault and battery. See In the Matter of Mayers, FAA Order No. 97-12 (February 20, 1997); In the Matter of Ignatov, FAA Order No. 96-6 (February 6, 1996). In the Matter of Sharon Dorfman, FAA Order No. 99-16 (December 22, 1999) at 14, the Administrator explained these terms as follows:

> A battery is an intentional tort, involving a "harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." In the Matter of Ignatov, at 8, quoting W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 9, at 39 (5th ed. 1984). An assault is also an intentional tort, arising from intentional acts causing another person to be in fear of harmful or offensive contact, as distinguished from an actual

contact. In the Matter of Ignatov at 8; Prosser & Keeton on the Law of Torts § 10, at 43. In the Matter of Mayer, at 9.

Assaults on flight attendants are very serious offenses and must be dealt with severely. As I wrote in my initial decision in Matter of Oscar Vergara, Docket No. CP05SO0055 (September 14, 2006) at 4-5:

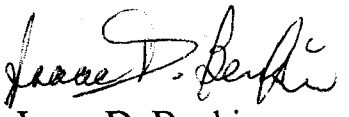
> If passengers are allowed to curse out Flight Attendants and roughhouse them in an effort to cause injury, there eventually will be no Flight Attendants. The safety and comfort of the traveling public will suffer an irretrievable loss. People who wish to travel safely will lose that option if they are compelled to share their accommodations with drunken and violent passengers who terrorize their fellows.

Unless and until the airlines develop a methodology to screen out potential passengers who are depressed or have recently become bereft of their erstwhile companions, the mental state of the Respondent at the time he boarded the flight in question is simply irrelevant. He was not privileged to impose the consequences of his mental condition on flight attendants or fellow passengers. Nor is it relevant that the Respondent had recently been discharged from active duty; even veterans have to behave responsibly and avoid assaulting flight attendants.

In short, I do not accept the Respondent's notion that his status somehow exempted him from his duty of civility. His lack of resources with which to pay a substantial penalty is relevant and significant, however. The evidence he has submitted shows that his earnings for the years 2003 and 2004 (the last two years for which the Social Security Administration had reportable data) were $25,325 and $14,052, respectively. I cannot in good conscience approve the FAA's recommendation for an assessment that would amount to more than half of the Respondent's annual income. Balancing this consideration against the seriousness of the Respondent's violation, I conclude that the Respondent should be assessed a civil penalty of $1,000 for each of the two violations he committed. He will be assessed a civil penalty in the amount of $2,000.

In consideration of the foregoing, and subject to appeal to the Administrator as provided in 14 C.F.R. § 13.233, **IT IS ORDERED** that –

1. The Respondent, Joaquin Rodriguez, is liable to the United States, as represented by the Federal Aviation Administration, for a civil penalty in the amount of $2,000; and
2. The Respondent shall pay the amount of the civil penalty set forth above to the Federal Aviation Administration forthwith.



Isaac D. Benkin
Administrative Law Judge

[Note: This decision may be appealed to the Administrator of the FAA. The Notice of Appeal must be filed not later than 10 days from the date of this decision. The appeal must be perfected with a written brief or memorandum not later than 50 days from the date of this decision. The Notice of Appeal and brief or memorandum must be sent to the Federal Aviation Administration, Wilbur Wright Building, 800 Independence Avenue, S.W., Washington, D.C. 20591, Attention: Appellate Docket Clerk. A copy of the Notice of Appeal and brief or memorandum should also be sent to counsel for the FAA in this proceeding.]

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(Civil Penalty Action)

SERVICE LIST
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Hearing Docket
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Attn: Hearing Docket Clerk, AGC-430
Wilbur Wright Building – Room 2014[1]

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[1] Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Hearing Docket, Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building – Room 2014, Washington, DC 20591, Att: Hearing Docket Clerk, AGC-430.